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SUPREME COURT, U.S.
FILED
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No. 03-1086

In The Supreme Court of the United States

SHR LIMITED PARTNERSHIP,
a West Virginia limited partnership,

Petitioner,

v.

MERCURY EXPLORATION CO.,
a Texas corporation,
and DOMINION RESERVES, INC.,
a Michigan corporation,
and QUICKSILVER RESOURCES, INC.,
a Delaware corporation,

Respondents.

On Petition For Writ of Certiorari To The Michigan Court Of Appeals

PETITIONER'S REPLY SUPPORTING ITS PETITION FOR WRIT OF CERTIORARI

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I. Introduction

Despite Respondents' assertions to the contrary, the basis of the Petition is the Michigan Court system's practice of denying parties their day in court through a misapplication of res judicata. Respondents, apparently aware of the compelling nature of the Petition, resort to accusations of deception and arguments made without legal support instead of engaging Petitioner's claims on their merits.

II. Reply to Respondents' Counter-Statement of Facts

Contrary to Respondents' accusatory statements about misleading information, the factual statements disputed by Respondents are all taken directly from the Opinion of the Michigan Court of Appeals Opinion and, therefore, constitute law of the case in this matter.

1. The Michigan Court of Appeals *expressly stated* that the trial court had reached its conclusion "for the wrong reasons." Michigan Court of Appeals Opinion, Petition Appendix, p. 3a.

2. The Michigan Court of Appeals stated in its Opinion that "[t]he current litigation began when defendants, ***in contravention of the settlement agreement***, began deducting post-production costs from plaintiff's royalty interests." Michigan Court of Appeals Opinion, Petition Appendix, p. 2a [emphasis added].

3. The Michigan Court of Appeals stated that "because the settlements prohibited the defendants from making the deductions, the settlements reached a result opposite from

> the trial court's original ruling." Michigan Court of Appeals Opinion, Petition Appendix, p. 2a.

The remainder of the "factual disputes" raised by Respondents in their Response to the Petition for Writ of Certiorari are actually disputes over legal issues that Petitioner is asking this Court to rule on.

III. Reply to Respondents' Argument

Without legal authority for its position, Respondent then argues that the Order entered dismissing the prior litigation was not a "final judgment" because it was signed by the clerk of the Michigan Court of Appeals and not by a judge. The fact of the matter is, contrary to Respondents' assertions, that this Court, as well as the state courts of Michigan and other jurisdictions, have ***never*** made such a distinction. This Court has even held regarding final judgments that

> the modes of evidencing the character of the judgment and of attesting the fact and time of its rendition vary from state to state according to local statute or custom, from a simple docket entry or the statement of a conclusion in an opinion, ***to a formal adjudication, signed by the judge or the clerk***, in a journal or order book, or filed as part of the record in the case.

United States v. Hark, 320 U.S. 531, 534, 64 S.Ct. 359, 88 L.Ed. 290 (1944) [emphasis added].[1] Furthermore, the

[1] The following is a short list of some other cases showing that no distinction is made between the "final judgment" status of judgment or

(Continued on following page)

Michigan Court Rules recognize the power of a clerk to enter final judgments. Michigan Court Rule 2.603(2).

Respondents' citation to cases discussing the dismissal of action due to mootness are irrelevant because in such cases, unlike in the case at hand, the dismissal order did not change the prior judgment. Here, the Order dismissing the prior litigation affirmatively refers to the stipulation, which had been filed with the Michigan Court of Appeals, which, in turn, refers to the settlement agreement between the parties, which agreement the Michigan Court of Appeals expressly found "reached results opposite the trial court judgment." Petition Appendix, p. 2a. This demonstrates that, at the very least, the trial court's order in the prior litigation was ***modified*** through the settlement and dismissal of that action while pending appeal.

Moreover, the Michigan Court of Appeals' ruling, which the Michigan Supreme Court refused to review, is directly contrary to the purposes of res judicata and the American judicial system in general. In spite of Respondents' criticism of Petitioner for asking this Court to rule on the questions presented in this case, the Michigan Supreme Court has made it clear that it will not address these problems, leaving this Court as the sole entity with

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decisions signed by a judge and those signed by a court clerk. *Notley v. Brown*, 208 U.S. 429, 28 S.Ct. 385, 52 L.Ed. 559 (1908); *Finnsugar Bioproducts, Inc. v. Monitor Sugar Co.*, 2002 U.S.Dist. LEXIS 23565 (E.D.Mich. 2002); *Liadis v. Fekos*, 1991 U.S.App. LEXIS 24390 (6th Cir. 1991) [unpublished opinion attached hereto as Appendix 1] (holding that stipulated judgments and consent judgments have the same force and effect of all other judicial determinations when regarding res judicata, then rejecting respondents argument that Ohio did not accord such judgments the same status).

the power to remedy the wrong and unconstitutional policy accepted by the Michigan Court of Appeals. It is axiomatic that the purpose of the civil court system in this country is to justly and equitably resolve disputes between parties, and the goal of res judicata is to ensure the permanency of such resolutions (and in so doing promote judicial economy). The prior litigation was resolved in the most just and equitable manner possible – through a voluntary settlement entered into by the parties to the litigation. The parties then had the court case dismissed in the most judicially economic and efficient way possible – by having the clerk of the Michigan Court of Appeals enter a stipulated final decision dismissing the case. To now throw out the settlement agreed to by the parties for no reason beyond the manner in which the parties' agreement was preserved by the court would be to undermine those very principles. It replaces the equitable and just ***agreed resolution*** of the prior case with a trial court judgment that the parties agreed to change. Further, the Michigan Court of Appeals' ruling in essence punishes Petitioner simply because its predecessor in interest, after the parties to the prior litigation had agreed to a resolution of their dispute, ended the court case in the most judicially efficient way possible.

Respondents' response to Petitioner's public policy considerations are disingenuous at best. Respondents' only response is, essentially, that the Michigan Court of Appeals' ruling in this case will not chill settlements because parties can take it into account when trying to settle cases. This is a non-sequiter response. Petitioner stands by the public policy argument as presented in its Petition for Writ of Certiorari and adds only that the effects could easily spread to cases already settled. If the Michigan Court of

Appeals' ruling is allowed to stand, in any case that was settled after trial, wherein the parties did not present a formal "consent judgment" to be signed by the judge, the party winning at trial would have no incentive to continue following the agreed-upon contrary settlement, knowing that any violation thereof could not be litigated because the courts will apply res judicata to any attempt to enforce the settlement agreement.

IV. Conclusion

For the reasons set forth in the Petition for Writ of Certiorari and supported above, this Court must take jurisdiction over this matter and end the Michigan Courts' extreme use of res judicata in a manner that not only denies deserving litigants access to the courts, but also discourages voluntary settlement of disputes and encourages parties to breach settlement agreements in circumstances such as those present in this case.

Respectfully submitted,

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APPENDIX

1991 U.S. App. LEXIS 24390

GEORGE LIADIS, Plaintiff-Appellant, v. CHRISTOPHER P. FEKOS, Defendant-Appellee

No. 91-3184

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

October 7, 1991, Filed

NOTICE:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

JUDGES:

Martin and Milburn, Circuit Judges; and Charles W. Joiner, Senior District Judge.*

OPINION BY:

PER CURIAM

George Liadis sued Christopher Fekos claiming that Fekos fraudulently obtained a judgment in Pennsylvania

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* The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

state court on a cognovit note executed by Liadis. Fekos argued that Liadis's claim was barred by res judicata and moved for summary judgment. The district court granted summary judgment in favor of Fekos giving rise to the present appeal. For the following reasons, we affirm.

This is the latest in a series of lawsuits between Fekos and Liadis. The root of the present appeal is whether or not, in the multitude of prior litigation between Liadis and Fekos, Liadis had an earlier opportunity to raise the present claim. The district court found that Liadis did have such an opportunity and so Liadis is barred from bringing the instant action. The following chronology of events is helpful:

> 11/23/82 Liadis subcontracts with Fekos to do construction work under Fekos's contract with the Army. Liadis executes a cognovit note to secure his performance.
>
> 1/18/83 Fekos obtains a judgment against Liadis on the cognovit note in Pennsylvania ["the Pennsylvania case"].
>
> 1/28/83 Fekos files a complaint in Ohio state court seeking a judgment for $130,000 based on the Pennsylvania judgment ["the Ohio case"].
>
> 2/28/83 Liadis's brother, on behalf of George Liadis, answers the 1/28 complaint. Liadis claims that neither George nor his father (the other defendant in both the Ohio and Pennsylvania case) knew of the Pennsylvania case or the judgment, and that the judgment is "not justly nor truly due."

Early '84 Liadis filed suit in Virginia federal district court seeking payment under the construction contract's terms ["the Virginia case"].

> 8/24/84 The Virginia federal court action is dismissed with prejudice on joint motion by the parties.
>
> 9/6/84 Liadis substitutes William Brown as attorney, in place of Pete Mattis, in the Ohio case.
>
> 2/28/85 Fekos moves for summary judgment in the Ohio case claiming that Liadis's claim for "irregularity" of the Pennsylvania judgment should be made in Pennsylvania. This motion was apparently never responded to by the court given the events of 3/27/85.
>
> 3/27/85 Liadis executes and causes to be filed the stipulated judgment between the parties. The judgment awards Fekos $130,000 but is expressly conditioned upon the Pennsylvania judgment not being "opened, reversed or otherwise vacated." Any question as to whether the Pennsylvania judgment should be opened, etc. should be litigated in Pennsylvania courts.
>
> 8/18/88 Liadis brings this suit in Ohio federal district court.
>
> 6/6/90 District court rejects Fekos's motion to dismiss without prejudice and suggests Fekos file his next motion with supporting documents.
>
> 1/15/91 Fekos' motion for summary judgment is granted by the district court.

First, Liadis claims that Fekos never provided proper additional evidence that would establish that the issues of fraud or breach of trust had already been raised and

adjudicated on the merits prior to this lawsuit. Liadis also claims that he was not represented by counsel when entering into the stipulated judgment.

Fekos, in support of his motion for summary judgment, submitted copies of several documents previously filed in the Ohio or Pennsylvania cases. The court found these documents were self-authenticating because they were filed in a "public office" and stamped or certified by court employees. Based upon this documentation, the court found, as a matter of fact, that Liadis was aware of the Pennsylvania judgment by at least February 28, 1983. Further, although the February 28, 1983 response was filed by Liadis's brother, and not an attorney, the court found that other documents submitted by Fekos indicate that Liadis was sufficiently represented by counsel at various points during the litigation. The district court's factual determination in both these preliminary matters appears to be supported by the chronology of events described above and does not constitute reversible error.

Liadis claims that the stipulated judgment was not a determination on the merits and, thus, cannot have res judicata effect. The stipulated judgment states that, "should said Pennsylvania judgment hereafter be opened, reversed or otherwise vacated, the judgment rendered herein will to the same extent be so opened, reversed or vacated."

In *Johnson's Island, Inc. v. Board of Township Trustees,* 69 Ohio St.2d 241, 243 (1982), the Ohio Supreme Court held that "[a] final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts . . . and is a complete bar to any subsequent

action upon the same cause of action. . . ." This is true, as well, of stipulated or consent judgments, which have the same finality and conclusiveness of any other judicial determination. Liadis purports that stipulated judgments are somehow less than judicially determinative; Ohio cases indicate, however, that stipulated judgments are equivalent to any other judicial determination on the merits. *See First Nat'l Bank in St. Petersburg v. Hoffman,* 1991 WL 18686, slip op. (Oh. App. 1991) (stipulated judgment provides monetary award of almost $225,000); *Cashelmara Condominium Unit Owners Ass'n v. Cashelmara Co.,* 1990 WL 180645, slip op. (Oh. App. 1990) (stipulated judgment determines liability of parties); *Ohio Bar Liability Ins. Co. v. INA Underwriters Ins. Co.,* 1990 WL 173456, slip op. (Oh. App. 1990) (case was settled by a stipulated judgment and order in which California retained jurisdiction to enforce the agreement).

Alternatively, Liadis claims that compulsory counterclaims "cannot" be res judicata barred. In an effort to support this claim, Liadis misstates *Reynolds v. Hartford Accident Indemnity Co.,* 278 F. Supp. 331 (S.D.N.Y. 1967). The *Reynolds* court found that the "Rule governing compulsory counterclaims should be read as barring them on estoppel or waiver basis rather than on merger or res judicata basis." *Id.* As this quotation clearly indicates, the district court indicated a desire that compulsory counterclaims be barred on estoppel or waiver grounds, rather than res judicata grounds. The *Reynolds* court, however, did *not* imperatively hold that such claims *"cannot"* be barred on res judicata grounds. Counter to Liadis's assertion, *Reynolds* does not nullify the compulsory counterclaim rule by requiring trials in all cases and by prohibiting stipulated judgment entries. As the district

court observed and as a sampling of Ohio law reveals, compulsory counterclaims most certainly do have res judicata effect. *See Quintus v. McClure,* 536 N.E.2d 22, 23 (1987); *Geauga Truck & Implement Co. v. Juskietisz,* 457 N.E.2d 827, 828 (1984). *See also* Rule 13(a) of Ohio Rules of Civil Procedure and 13(a) of the Federal Rules of Civil Procedure (compulsory counterclaims arise out of the transaction or occurrence that is the subject matter of the opposing party's claim; a default judgment can have res judicata effect with regard to a compulsory counterclaim asserted under 13(a)).

Liadis argues that Fekos will be allowed to perpetrate a fraud if the court finds Liadis's claim barred by res judicata. Liadis cites to *Whitehead v. General Telephone Co.,* 254 N.E.2d 10, 11 (1969), where the court found that "[a] final judgment or decree rendered upon the merits without fraud or collusion by a Court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies and is a complete bar to any subsequent actions. . . ." Liadis emphasizes the *Whitehead* court's stipulation that a final judgment be "without fraud." Thus, Liadis claims, principles of equity require us, even if we find res judicata a technical bar to this suit, to allow Liadis's suit nonetheless. To the contrary, we find that equity does *not* require us to override the bar created by res judicata in this case, given the chronology of litigation between Liadis and Fekos.

The district court's disposition of this case squarely addresses the res judicata question in all its forms:

> *Having failed to take action in the Pennsylvania court to set aside the judgment, or having unsuccessfully taken action to do so, plaintiff cannot now seek such relief in this Court.*

Plaintiff had a full and fair opportunity in the Ohio case to litigate his claim that the Pennsylvania judgment was fraudulently obtained and his claim that defendant's conduct constituted a breach of trust. Additionally, after the Virginia case was settled, plaintiff had the opportunity in the Ohio case to argue that defendant's further efforts to collect on the Pennsylvania judgment were barred by the settlement in the Virginia case. For purposes of the Ohio case, both of these issues were resolved by the stipulated judgment against plaintiff, contingent upon the Pennsylvania judgment not being opened, reversed or otherwise vacated. Plaintiff is bound by the terms of the stipulated judgment entry, and since the Pennsylvania judgment was never set aside as to plaintiff, the Ohio judgment is binding on plaintiff and on this Court.

As the district judge observed, Liadis has "had a full and fair opportunity" to litigate his fraud claim. Liadis should not be given another free shot at bringing a cause of action for fraud against Fekos.

Accordingly, the judgment of the district court is affirmed.